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IN THE

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OCTOBER TERM, 1975

No. [redacted]

THE CESSNA AIRCRAFT COMPANY, et al.,

vs.

WHITE INDUSTRIES, INC., et al.,

REPLY SUPPORTING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DON H. REUBEN
E. HOUSTON HARSHA
GARY M. ELDEN
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Attorneys for Defendants-Petitioners The Cessna Aircraft Company, Cessna Finance Corporation, Pennant Aviation, Inc., Dwane Wallace, Delbert L. Roskam, Robert P. Bauer, Edward B. Chase, and Harold Gorrell

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Respondents make two assertions that require a brief reply.

I.

THE COURTS OF APPEALS HAVE HELD THAT THEIR DECISIONS ARE IN CONFLICT.

Respondents assert that there is no conflict among circuits. But in the most recent case on the issue, the Ninth Circuit specifically noted that its view was in conflict with that of the Second Circuit. *Blackie* v. *Barrack*, ... F. 2d

....., CCH Fed. Sec. L. Rptr. ¶95,312, at pp. 98,576-98,578 (9th Cir. September 25, 1975). The Ninth Circuit stated: "We are asked, the issue being novel in this circuit, to adopt the Second Circuit's position. We decline to do so . . . ." *Id.* 98,576-98,577. The court referred to "our disagreement with the Second Circuit rule." *Id.*, n. 8. After discussing the Second Circuit rule, the Ninth Circuit concluded: "With deference, we disagree. . . . It strikes us that the Second Circuit rule is the product of three policy considerations, urged on us here as well, which we conclude are insufficient . . . ." *Id.* 98,578.

The conflict among circuits involves (1) the rule of five circuits that a class action certification order is *never* appealable as a final judgment and (2) the rule of the Second Circuit that such an order is *sometimes* so appealable.[1] The conflict involves an extremely important question of federal appellate jurisdiction which cries out for resolution by the Supreme Court of the United States. The problem will not disappear; it can only be resolved by this Court. With seven Circuits now having ruled on the point and with more than a dozen recent opinions on the books, the question is clearly ripe for resolution.

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[1] The Tenth Circuit may have adopted the Second Circuit rule in *Seiffer* v. *Topsy's International, Inc.*, 520 F. 795, 798 (10th Cir. 1975) (dismissing appeal after holding that case did not meet the three-pronged test used by the Second Circuit), bringing to seven the number of circuits that have ruled on the instant issue.

II.

THE EIGHTH CIRCUIT COULD READILY DETERMINE THE INSTANT CLASS ACTION ISSUES WITHOUT CONSIDERING THE MERITS.

Under the Second Circuit rule which petitioners urge this Court to adopt, only *some* class action certifications are appealable as final collateral judgments. For one thing, a ruling must be "separable from the merits" of the case in order to be appealable under the Second Circuit rule. There are at least two such issues in this case: (a) whether the instant Robinson-Patman claim can be maintained as a class action; and (b) whether a terminated dealer can represent a class including present dealers of the same manufacturer.

A. The Robinson-Patman Class Action Issue.

The only precedent allowing a class action in a Robinson-Patman Act case is *Gold Strike Stamp Co.* v. *Christensen,* 436 F. 2d 791 (10th Cir. 1970). This case has never been followed and was cogently criticized in Note, "Class Actions Under the Robinson-Patman Act: *Gold Strike* May Be Only Iron Pyrite," 25 Stan. L. Rev. 764 (1973). Respondents state at p. 7 of their Response that *Albertson's, Inc.* v. *Amalgamated Sugar Co.,* 62 F.R.D. 43 (D. Utah 1973) and *Bel Air Markets* v. *Foremost Dairies, Inc.,* 55 F.R.D. 538 (N.D. Cal. 1972) "expressly acknowledge" the *Gold Strike* case. In fact, *Bel Air* distinguished *Gold Strike,* 55 F.R.D. at 542, and effectively confined the case to its peculiar facts. *Id.* The *Albertson's* case took the same approach, terming the *Gold Strike* situation "unique," 62 F.R.D. at 55. *Albertson's* was then affirmed by the same Court of Appeals that authored *Gold Strike.* 503 F. 2d 459 (10th Cir. 1974). The Tenth Circuit in *Albertson's* found

itself "in general agreement with the trial court's line of reasoning." *Id.* 464.

Aside from the dubious *Gold Strike* opinion, court after court in Robinson-Patman cases have held class actions inappropriate because of the individual issues necessarily involved. A Robinson-Patman claimant must allege and prove that he personally is in competition with an allegedly favored purchaser. That individual issue makes class action treatment unsuitable. *Bel Air Markets, supra*; *Shaw* v. *Mobil Oil Co.*, 60 F.R.D. 566 (D. N.H. 1973); *Gulf Wandes Corp.* v. *General Electric Co.*, 62 F.R.D. 377 (E.D. La. 1974). See also *Hettinger* v. *Glass Specialty Co.*, 59 F.R.D. 286 (N.D. Ill. 1973). As to each allegedly actionable sale, a claimant must show that his goods were of "like grade and quality" with those involved in the allegedly discriminatory sale. That issue also involves detailed and highly individualized proof which make a class action inappropriate. *Gulf Wandes, supra*; *Hettinger, supra.* These and other inherently individual issues so dominate Robinson-Patman cases as to present insuperable barriers to class treatment. All of these problems are apparent from the face of a Robinson-Patman complaint; they do not ordinarily require an examination of the "merits" of the case.

If the precedents are followed, the instant class action would be disallowed without any need for an examination of the merits of any of respondents' allegations. Whether to follow those precedents is of course a question for the Eighth Circuit, not for this Court. For purposes of the present Petition, it is enough to note that the Robinson-Patman class action issue presents a general question of law wholly separable from the merits of the allegations in this case.

B. Terminated Dealer Class Action Issue.

Another problem common to Robinson-Patman cases is that the members of the alleged class are generally competitors with each other. For this reason, Robinson-Patman actions frequently generate antagonisms and conflicts of interest which preclude a class action.[2] Although these conflicts take various forms, the most intense and serious conflict arises when a terminated dealer tries to represent current dealers in a Robinson-Patman case. No court has ever allowed such a case to proceed on a class basis.

The existence of such a conflict is generally apparent simply from viewing the complaint. However, even if the parties present evidence to show the exact nature and extent of a potential conflict, the record on that matter will have nothing to do with the merits of the case.

Many courts have held that it violates due process to permit a terminated dealer to represent a class of present dealers. If those courts are correct, the constitutional violation involved is consummated before verdict. A post-verdict appeal cannot correct it. The Eighth Circuit rule (which is also the majority rule) precludes effective review of such threats to due process. That is a significant enough problem to warrant review by this Court.

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2 See, *e.g.*, *J.W.T., Inc.* v. *Seagram & Sons, Inc.* 63 F.R.D. 139 (N.D. Ill. 1974), *Minielli Cement Contracting, Inc.* v. *Richter Concrete Corp.*, 62 F.R.D. 381 (S.D. Ohio 1973), and *Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. 43 (D. Utah 1973), *aff'd.*, 503 F. 2d 459 (10th Cir. 1974), all cited in the Petition at pp. 7-8, n. 3.

CONCLUSION

For the reasons stated in our Petition for Writ of Certiorari and amplified herein, we respectfully urge this Court to grant the Petition in order to review the important question of federal appellate jurisdiction that has resulted in conflicting opinions among seven circuits.

Respectfully submitted,

DON H. REUBEN
E. HOUSTON HARSHA
GARY M. ELDEN
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

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